Supreme Court, U.S.
FILED
MAY 2 7 2003
OFFICE OF THE CLERK

No. 02-1419

IN THE

Supreme Court of the United States

SHENANGO INCORPORATED, *et al.*,
Petitioners,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION FOR THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

JOHN R. MOONEY
ELIZABETH A. SAINDON
MOONEY, GREEN, BAKER & SAINDON, P.C.
1920 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-0010

PETER BUSCEMI
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-5190

DAVID W. ALLEN
Office of the General Counsel
UMWA HEALTH & RETIREMENT FUNDS
2121 K Street, N.W.
Washington, D.C. 20037
(202) 521-2220

Counsel for Respondents Trustees of the UMWA Combined Benefit Fund

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

60

QUESTION PRESENTED

Under the Coal Industry Retiree Heath Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), Petitioners Shenango Incorporated, Stelco U.S.A., Inc., Stelco Coal Company, and Mueller Industries, Inc. (the "Companies") are members of controlled groups of corporations that include one or more companies that signed the 1974, 1978, or later National Bituminous Coal Wage Agreements ("NBCWAs") with the United Mine Workers of America ("UMWA"). Each of these collective bargaining agreements referred expressly to lifetime health care benefits for coal industry retirees and their dependents. Under the Coal Act, the Commissioner of Social Security has assigned the Companies liability for the health care premiums of retirees who worked for employers that were either owned by the Companies or absorbed through a corporate merger but that are no longer in business.

The question presented is whether Congress correctly concluded in the Coal Act that neither the Due Process Clause nor the Takings Clause of the Fifth Amendment prevents the Commissioner from treating the Companies and their "related persons" as a single controlled group of corporations for purposes of assessing liability for retiree health care under the statute.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

I. The Coal Act 4

A. History and Structure of the Coal Act 4

B. Related Person and Controlled Group Liability 6

II. The Companies' Involvement in the Multiemployer Health Care System 8

III. The *Eastern* Decision 9

IV. Proceedings Below 10

ARGUMENT 11

I. *Eastern* Does Not Support the Companies' Position 12

II. The Companies Are Not Substantially Identical To Eastern 13

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Association of Bituminous Contractors v. Apfel,
156 F.3d 1246 (D.C. Cir. 1998) 14

A.T. Massey Coal Company, Inc. v. Barnhart,
305 F.3d 226 (4th Cir. 2002), *cert. denied*,
123 S. Ct. 1928 (2003) ..... *passim*

Anker Energy Corp. v. Consolidated Coal Co.,
177 F.3d 161 (3d Cir.), *cert. denied*,
528 U.S. 1003 (1999) 11, 13

Barnhart v. Peabody Coal Co.,
123 S. Ct. 748 (2003) 4

Barnhart v. Sigmon Coal Co., Inc.,
534 U.S. 438 (2002) 4

Berwind Corp. v. Commissioner of Social Security,
307 F.3d 222 (3d Cir. 2002), *cert. denied*,
123 S. Ct. 1927 (2003) ..... *passim*

Blue Diamond Coal Co. v. Shalala (*In re Blue Diamond Coal Co.*), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997) 4

Branch v. United States, 69 F.3d 1571 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 810 (1996) 16

Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing,
691 F. Supp. 6 (W.D. Mich. 1987), *aff'd*, 892 F.2d 1043 (6th Cir. 1990) 15

Connors v. Brady-Cline Coal Co.,
668 F. Supp. 5 (D.D.C. 1987) 15

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) ..... *passim*

Holland v. Big River Minerals Co.,
81 F.3d 597 (4th Cir. 1999), *cert. denied*,
528 U.S. 1117 (2000) 13

Holland v. Pardee Coal Co.,
269 F.3d 424 (4th Cir. 2001), *cert. denied*,
123 S. Ct. 986 (Jan. 21, 2003) 4

Lindsey Coal Mining Co. v. Chater,
90 F.3d 688 (3d Cir. 1996) 4

LTV Steel v. Shalala (*In re Chateaugay Corp.*),
53 F.3d 478 (2d Cir.), *cert. denied*,
516 U.S. 913 (1995) 16

Meriden Trust & Safe Deposit Co. v. FDIC, 62 F.3d
449 (2d Cir. 1995) 16

Nell Jean Industries, Inc. v. Barnhart,
224 F. Supp. 2d 10 (D.D.C. 2002), *appeal pending*,
No. 03-5099 (D.C. Cir. docketed Apr. 10, 2003) 13

Pension Benefit Guar. Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984) 17

Pension Benefit Guaranty Corp. v. Ouimet Corp.,
470 F. Supp. 945 (D. Mass. 1979), *aff'd*, 630 F.2d
4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) ... 15

Unity Real Estate Co. v. Holland,
178 F.3d 649 (3d Cir.), *cert. denied*,
528 U.S. 963 (1999) 4, 11, 13

Wheeling-Pittsburgh Steel Corp. v. Barnhart,
229 F. Supp. 2d 539 (N.D. W. Va. 2002),
appeal pending, Nos. 02-1799, 02-1800
(4th Cir. docketed July 29, 2002) 13

STATUTES

26 U.S.C. § 52(a) 6-7

26 U.S.C. § 52(b) 6

Coal Industry Retiree Heath Benefit Act of 1992, 26
U.S.C. §§ 9701 *et seq.* ..... *passim*

Employee Retirement Income Security Act of 1974
("ERISA"), 29 U.S.C. §§ 1001 *et seq.* 15

Multiemployer Pension Plan Amendments Act of
1980 ("MPPAA"), 29 U.S.C. §§ 1132 *et seq.* 15

30 U.S.C. § 1232(b), (h) 5

Consolidated Appropriations Act, 2000, Pub. L. No.
106-113, Title V, 113 Stat. 1501 (1999) 6

Department of Interior and Related Agencies
Appropriations Act of 2001, Pub. L. No. 106-291,
§ 701(a), 114 Stat. 922 (2000) 6

OTHER AUTHORITIES

138 Cong. Rec. 34002 (1992) 17

IN THE

Supreme Court of the United States

02-1419

SHENANGO INCORPORATED, *et al.*,
Petitioners,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION FOR THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-49a) is reported at 307 F.3d 174. The opinion of the district court (Pet. App. 50a-61a) is reported at 2000 U.S. Dist. LEXIS 22208 (W.D. Pa. July 25, 2000).

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), as applied to petitioners Shenango Incorporated, Stelco U.S.A., Inc., Stelco Coal Company, and Mueller Industries, Inc. (the "Companies"). The Companies do not reproduce the statute in full in their submission. Among other things, they omit the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy.

Accordingly, the complete Coal Act is reproduced as an appendix to this brief.

STATEMENT OF THE CASE

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the petitioner in that case. The plurality and concurring opinions in *Eastern* held that Section 9706(a)(3) of the statute, 26 U.S.C. § 9706 (a)(3), is unconstitutional as applied to a company that left the coal business in 1965, did not sign any collective bargaining agreement with the UMWA after that time, and was not a statutory "related person" to any company that signed a National Bituminous Coal Wage Agreement ("NBCWA") in 1974 or thereafter. The Companies in this case claim that they are "substantially identical" to the petitioner in *Eastern*. Pet. 6. As the court of appeals correctly recognized, however, the Companies and Eastern are not similarly situated, and their reliance on *Eastern* is misplaced.

The Companies themselves acknowledge (Pet. 15) that their arguments are "substantially the same" as those presented in two petitions that this Court denied earlier this month, *A.T. Massey Coal Company, Inc. v. Barnhart*, 305 F.3d 226 (4th Cir. 2002), *cert. denied*, 123 S.Ct. 1928 (2003), and *Berwind Corp. v. Commissioner of Social Security*, 307 F.3d 222 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003). Indeed, the Companies' say that they "incorporate[] by reference" the arguments made in the petitions filed by Massey and Berwind. Although the Companies contend that they also offer a "supplemental argument" in support of their request review, the petition does not contain any substantive point not already raised in the petitions filed by Massey and Berwind.

Congress decided in the Coal Act to treat a controlled group of corporations – a signatory operator and all of its related persons – as a single entity for purposes of assessing

health care liability. *See, e.g.*, 26 U.S.C. §§ 9701(c)(2)(A)(i); 9706(b)(1)(A). Congress rationally determined that all entities in a corporate family should be responsible for the health care commitments that any of those entities made. As a signatory to the 1974, 1978, or later NBCWAs, coal operators in each Company's controlled group made commitments regarding lifetime health care not only to their own former employees, but also to *all* of the beneficiaries of the collectively bargained UMWA multiemployer health care plans then in existence, including the beneficiaries whose premium assignments gave rise to these proceedings. That is the nature of a multiemployer plan. Particularly in these circumstances, there is nothing surprising or irrational about the legislative decision in the Coal Act to require the Companies and their corporate families to participate in the statutory solution to the financial crisis that afflicted the UMWA plans.

In contrast to the petitioner in *Eastern*, each of the Companies, like the petitioners in *Massey* and *Berwind*, is part of a controlled group of corporations that includes one or more coal companies that signed the 1974, 1978, or later NBCWAs. Under the "related person" provisions of the Coal Act, the Social Security Administration ("SSA") assigned each of the Companies several beneficiaries.

Contrary to the Companies' submission, this case does not involve employers that are "substantially identical" to Eastern. Rather, the issue here is whether the congressional decision to treat all members of a corporate control group as a single entity for purposes of Coal Act liability violates the Takings Clause or the Due Process Clause of the Fifth Amendment. The case was argued in the court of appeals on the same day before the same panel as *Berwind*. The court properly concluded, as it did in *Berwind* and as the Fourth Circuit did in *Massey*, that the Coal Act's "related person" provisions do not raise any constitutional concern. Further review is not warranted.

I. The Coal Act

The history of the events leading to enactment of the Coal Act has been reviewed at length by this Court and others. *Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748 (2003); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002); *Eastern Enterprises*, 524 U.S. at 504-15 (plurality opinion); *Holland v. Pardee Coal Co.*, 269 F.3d 424, 427-29 (4th Cir. 2001), *cert. denied*, 123 S. Ct. 986 (Jan. 21, 2003); *Unity Real Estate Co. v. Holland*, 178 F.3d 649 (3d Cir. 1999), *cert. denied*, 528 U.S. 963 (1999); *Blue Diamond Coal Co. v. Shalala* (*In re Blue Diamond Coal Co.*), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996). In addition, the relevant historical and legislative background has been summarized in the briefs in opposition recently filed by the Trustees of the UMWA Combined Benefit Fund in *Massey* and *Berwind*. We therefore mention only those aspects of that background that are relevant here.

A. History and Structure of the Coal Act

In October 1992, Congress enacted the Coal Act, to ensure the continuation of health benefits for retired coal miners and their families, including those that had been employed by the Companies' "related persons." The Coal Act was designed to remedy a financial crisis that threatened the solvency of the then-existing collectively bargained multiemployer system of health care, which had been providing health benefits to more than 100,000 beneficiaries. During the years immediately before the Coal Act was passed, the collectively bargained multiemployer health care plans – the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan – had been providing health care to the retirees of the Companies' "related persons", even though these entities had ceased to make contributions to those plans. In this regard, the Companies' "related persons" are typical of many other employers that for one reason or

another had discontinued their participation in the multiemployer system, but left behind their retirees to receive health care financed by others.

In the Coal Act, Congress provided for the creation of two new statutory trust funds. One of these funds is the UMWA Combined Benefit Fund ("Combined Fund"), into which the two existing multiemployer health care plans were merged effective February 1, 1993. The Combined Fund is financed primarily through annual premiums assessed to the beneficiaries' former employers.

The Coal Act also prescribes the method for financing health benefits for so-called "orphan" beneficiaries – those beneficiaries who could not be assigned to any signatory operator. These benefits are financed through statutorily mandated annual transfers of funds from two sources that otherwise would have been unavailable for retiree health care. First, under Section 9705(a) of the Coal Act, Congress directed that a total of $210 million be transferred to the Combined Fund from the UMWA 1950 Pension Plan, in equal installments during the Combined Fund's first three plan years. 26 U.S.C. § 9705(a). These funds were to be used principally to pay for unassigned beneficiaries' health care. Second, under Section 9705(b) of the Coal Act, Congress provided that, for each Combined Fund fiscal year beginning on October 1, 1995 and thereafter, certain funds will be transferred to the Combined Fund from the Abandoned Mine Reclamation Fund (the "AML Fund") established under the Surface Mining Control and Reclamation Act of 1977. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(b), (h). These sums are to be used entirely to pay for unassigned beneficiaries' health care.[1] If the various transfers

---

1/ In addition to the transfers prescribed in the Coal Act itself, Congress twice has made special appropriations for the Combined Fund. In each case, the appropriation involved an

provided in the statute prove insufficient to cover the unassigned beneficiaries' premium that otherwise would be assessed under the statute, the assigned operators will be assessed their pro rata share of the unpaid premium for unassigned beneficiaries. 26 U.S.C. §§ 9704(d), 9705(b)(2).

B. Related Person and Controlled Group Liability

In enacting the Coal Act, Congress sought to ensure that coal companies' internal corporate structure and the multiplicity of corporate entities frequently created under a common corporate parent would not be used as a means of evading statutory health care obligations. Congress determined that it was necessary to treat members of corporate families as a single entity for purposes of imposing liability for Coal Act premiums. The statute accomplishes this goal in three ways.

First, the Coal Act permits beneficiary assignments to be made to signatory operators or to their "related persons." 26 U.S.C. § 9706(a). Section 9701 provides that an entity is a related person to a signatory operator if it is: (i) a member of the same "controlled group of corporations" that includes the signatory operator, as that term is defined in 26 U.S.C. § 52(a); (ii) a trade or business under "common control" with a signatory operator, as that term is defined in 26 U.S.C. § 52(b); (iii) any other person who had a partnership interest or joint venture with a signatory operator in a business within the coal industry, if such business employed eligible beneficiaries; or (iv) a successor in interest of any person described in the previous three categories. *Id.* § 9701(c)(2). In turn, Section

---

additional transfer from the AML Fund. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Title V, 113 Stat. 1501, 1501A-214 (1999); Department of Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, § 701(a), 114 Stat. 922, 1024-25 (2000).

52(a) of the Internal Revenue Code defines "controlled group of corporations" to include, *inter alia*, parent-subsidiary groups, where the parent owns more than 50 percent of the total voting power of all classes of stock in the subsidiary or where the parent owns more than 50 percent of the total value of shares of all classes of stock in the subsidiary. *Id.* §§ 52(a), 1563(a).

The determination of which entities are "related persons" for purposes of the Coal Act is made as of July 20, 1992, or, if a signatory operator is no longer in business on that date, as of the time immediately before the operator ceased to be in business. 26 U.S.C. § 9701(c)(2)(B). A "related person" thus need not ever have mined coal or signed any NBCWAs, as long as it satisfies the statutory definition.

Second, the Coal Act makes all related persons jointly and severally liable for the obligations imposed under the Act. For example, with respect to Combined Fund premiums, Section 9704(a) provides: "Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a); *see also id.* § 9711(c) (individual employer plan obligations); § 9712(4) (1992 Plan obligations).

Finally, the Coal Act aggregates the employment of retirees by each "related person" in a corporate family and treats the related persons as a single employer for purposes of assigning Combined Fund beneficiaries. The statute provides that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Thus, every member of a controlled group is treated as if it had employed each of the miners that any one member had employed. As a consequence, as long as at least one member of the controlled group signed an NBCWA in 1974 or thereafter, all members of the controlled group are treated as if they had also signed that NBCWA, because employment by

any such signatory operator is treated as employment by any related persons to the operator.

II. The Companies' Involvement In The Multiemployer Health Care System

Each of the Companies is a part of a commonly controlled enterprise that participated in a collective multiemployer undertaking expressed in the NBCWAs of 1974, 1978, and later. These collective bargaining agreements referred explicitly to lifetime health benefits. The commitments undertaken by signatory companies were addressed not only to each company's own retirees but to *all* participants in the UMWA multiemployer system (including the retirees and their dependents whose premium assignments gave rise to this litigation).

Petitioner Shenango is a "related person" of Lucerne Coke Company ("Lucerne"), which was merged into Shenango in or shortly after 1971. Pet. 11. Lucerne last signed an NBCWA in 1971 and employed the miners assigned to Shenango. Pet. App. 13a n.4. As of July 20, 1992, Shenango was related, via its parent corporation, to Aloe Coal Company, which signed NBCWAs in 1974 and thereafter. *Id.*

Petitioner Stelco Coal mined coal under the name of its "related person" Mather Collieries ("Mather"), which permanently ceased operating sometime before 1964. Pet. App. 13a n.4. Petitioner Stelco USA is commonly owned with Stelco Coal. *Id.* Mather was a signatory to several NBCWAs, the last of which it signed in 1959. It employed the miners assigned to Stelco Coal and Stelco USA. As of July 20, 1992, Stelco Coal and Stelco USA were "related persons" to Pikeville Coal Company ("Pikeville"), which signed the 1974 and subsequent NBCWAs. *Id.*

Petitioner Mueller Industries, Inc. ("Mueller") is a "related person" to Joanne Coal Company ("Joanne"). Mueller

merged with Sharon Steel Corp., which had previously merged with Joanne. Joanne mined coal until approximately 1969. Pet. App. 13a n.4. Joanne was a signatory to a series of NBCWAs, the last of which it signed in 1964. It employed the miners assigned to Mueller. As of July 20, 1992, Mueller was a "related person" to Carpentertown Coal & Coke Co., which signed the 1978 NBCWA, and to United States Fuel Company, which signed the 1978 and later NBCWAs. *Id.*; *see also* Pet. 12.

III. The *Eastern* Decision

In *Eastern,* a sharply divided Court held that the Coal Act was unconstitutional as applied to the petitioner there. The plurality concluded that the Coal Act should be reviewed under the Takings Clause, and that it effected an unconstitutional taking as applied to Eastern. 524 U.S. at 522-23 (plurality). Justice Kennedy dissented from the plurality's conclusion that the Takings Clause governed, but concluded that, as applied to Eastern, the Coal Act violated the Due Process Clause. *Id.* at 539-50 (Kennedy, J., dissenting in part and concurring in the judgment). The four dissenting Justices agreed with Justice Kennedy that the Coal Act should be analyzed under the Due Process Clause, but concluded that it did not violate due process principles. *Id.* at 553-68 (Breyer, J., dissenting).

Eastern was a signatory to each NBCWA (or amendment) executed between 1947 and 1964. In 1963, Eastern began the transfer of its coal operations to a subsidiary, Eastern Associated Coal Corp. ("EACC"). This transfer was completed by 1965. After enactment of the Coal Act, Eastern was assigned under 26 U.S.C. § 9706(a)(3) more than 1,000 Combined Fund beneficiaries based on miners' employment with Eastern prior to 1966 and Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time. *Eastern*, 524 U.S. at 516-17 (plurality). Eastern contended that these assignments violated the Takings and Due Process Clauses of the Fifth Amendment.

It is undisputed that all nine Members of the Court in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly contemplated lifetime health benefits for retired miners and their dependents. 524 U.S. at 509, 530, 535 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment), 553 (Stevens, J., dissenting). The five Justices who combined to declare the Coal Act unconstitutional as applied to Eastern concluded that the negotiation of the 1974 NBCWA was a watershed event because it marked the first time that an explicit reference to lifetime retiree health benefits was included in the collective bargaining agreement.

Because the plurality and Justice Kennedy considered Eastern as an employer that left the coal industry in 1965 and did not sign the 1974 and later NBCWAs, the plurality viewed the Coal Act as imposing a burden on Eastern "unrelated to any commitment that the employer[] made," *id.* at 537, and Justice Kennedy viewed Eastern as "not responsible for the expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." *Id.* at 550. Because Eastern sold its subsidiary EACC in 1987, well before the July 20, 1992 date for determining "related person" status under the statute, the plurality noted that Eastern's relationship with EACC did not bear on Eastern's liability under the Coal Act. *Id.* at 530. Thus, the Court did not confront any situation in which, as here, a coal operator was a "related person" to, and a member of a "controlled group" of companies with, one or more other companies that signed the 1974, 1978, or later NBCWAs.

IV. Proceedings Below

On June 30, 1999, the Companies began this action against the Commissioner of Social Security and the Trustees of the Combined Fund in the Western District of Pennsylvania. The Companies claimed, *inter alia*, that the Commissioner's refusal to rescind certain beneficiary assignments was unlawful

under this Court's decision in *Eastern Enterprises*. Specifically, the Companies argued that their positions were substantially identical to that of the petitioner in *Eastern* and that, therefore, the assignments should be voided. The Companies also claimed that the Coal Act, as applied to them, violates the Takings Clause and the Due Process Clause of the Fifth Amendment.

The Commissioner moved to dismiss, or, alternatively, for summary judgment. The Trustees filed an Answer and Counterclaim seeking a declaration that the Coal Act is constitutional as applied to the Companies, as well as an injunction requiring the Companies to pay the premiums due under the Act. The Trustees also filed a legal memorandum in support of the Commissioner's motion. By Memorandum Order dated July 25, 2000, the district court granted the Commissioner's motion and issued an order dismissing all pertinent claims. Pet. App. 50a-61a.

On appeal, the Companies continued to argue that they are substantially identical to Eastern. The court of appeals rejected this argument, and affirmed the district court's dismissal. Pet. App. 25a-31a. In upholding the validity of the Coal Act as applied to coal operators like the Companies that are statutory "related persons" to companies that signed the 1974 and later NBCWAs, and concluding that such operators are not "substantially identical" to Eastern, the court of appeals reconfirmed the result it had reached in *Unity Real Estate v. Holland*, 178 F.3d 174 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999), and *Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161 (3d Cir.), *cert. denied*, 528 U.S. 1003 (1999).

ARGUMENT

The court of appeals' decision is correct, there is no disagreement among the courts of appeals on the issue, and further review is not warranted. The Companies concede that their petition raises "substantially the same" arguments made in

the petitions in *Massey* and *Berwind*, which this Court denied only three weeks ago. As the courts of appeals in those cases recognized, *Eastern* does not extend to entities like the Companies. Congress rationally determined that such entities, based on their status as "related persons" to 1974 or later NBCWA signatories, should be treated as part of a single corporate group that collectively made the very commitments that all Members of the Court in *Eastern* regarded as adequate constitutional justification for the exercise of legislative power in the Coal Act. *Eastern* therefore does not entitle the Companies to relief.

I. *Eastern* Does Not Support the Companies' Position

The Companies' sole argument in support of their petition is that they are, in all material respects, substantially identical to the petitioner in *Eastern*. As the court of appeals correctly held, however, the Companies' argument "ignores a critical distinction" – *Eastern* did not involve the Coal Act's related person provisions. Pet. App. 27a.

Nonetheless, the Companies try to dismiss their relationships with companies that signed the 1974 or 1978 and later NBCWAs by incorrectly asserting that the promises of retiree health care contained in those collective bargaining agreements concern only the retired employees who worked for those specific signatory employers and no one else. Pet. 11, 14. This betrays a fundamental misunderstanding of the nature of multiemployer plans. Contrary to the Companies' assertion, the commitments made by signatory employers in the Companies' controlled groups ran to all of the beneficiaries of the UMWA Plans, including all of the retirees and their dependents involved in the case.

Those commitments, properly attributable to the Companies as part of a controlled group with the companies that signed NBCWAs referring expressly to lifetime health care, are sufficient to sustain the validity of the Coal Act as applied

to the Companies. As SSA and the courts below correctly recognized, the Companies and Eastern are not similarly situated, and the Companies are not entitled to prevail merely by claiming constitutional equivalence to Eastern.

The Companies mount no independent constitutional attack on the Coal Act; citing no other authority, they simply argue that *Eastern* requires that the Coal Act be held unconstitutional as applied to them. The Companies' case thus stands or falls solely on the question of whether *Eastern* mandates the result the Companies seek. As the court of appeals properly determined, and as numerous courts have recognized in decisions that the Companies simply ignore, it does not. *Eastern* did not address the constitutionality of the Coal Act as applied to entities such as the Companies, which are part of a controlled group of corporations including post-1974 NBCWA signatories. *See*, in addition to *Massey*, *Berwind*, *Unity Real Estate*, and *Anker Energy*, *Holland v. Big River Minerals Co.*, 181 F.3d 597 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000); *Nell Jean Industries, Inc. v. Barnhart*, 224 F. Supp. 2d 10 (D.D.C. 2002), *appeal docketed*, No. 03-5099 (D.C. Cir. Apr. 10, 2003); *Wheeling-Pittsburgh Steel Corp. v. Barnhart*, 229 F. Supp. 2d 539 (N.D. W. Va. 2002), *appeal docketed*, Nos. 02-1799, 02-1800 (4th Cir. July 29th, 2002).

II. The Companies Are Not Substantially Identical to Eastern

Despite their contention, the Companies are not substantially identical to Eastern. The plurality and concurring opinions in *Eastern* both proceeded on the basis that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 524 U.S. at 516 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment). By contrast, a commonly owned company in each of the

Companies' controlled groups signed multiple NBCWAs after 1974.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. *See, e.g.*, 524 U.S. at 530 (plurality opinion) (the 1974, 1978, and later NBCWAs "first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members."); *id.* at 550 (Kennedy, J., dissenting in part and concurring in the judgment) (Eastern "was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business."); *id.* at 553 (Stevens, J., dissenting) (the "implicit agreement [in the industry to provide retiree health care benefits] was made explicit in 1974"). The Companies do not dispute this.

The 1974, 1978, and subsequent NBCWAs thus created in retired coal miners a reasonable expectation of lifetime health benefits. As the D.C. Circuit said in *Association of Bituminous Contractors* v. *Apfel*, "[t]he clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." 156 F.3d 1246, 1257 (D.C. Cir. 1998).

Nonetheless, the Companies contend that *Eastern* does not permit consideration of the Coal Act's "related person" provisions in determining the constitutionality of SSA's beneficiary assignments. Pet. 15-17. In fact, neither the plurality nor Justice Kennedy in *Eastern* addressed the operation of the "related person" provisions, which were not at issue in that case. The Companies' argument also disregards the central role that "controlled group" liability plays under

various statutory schemes, including the Internal Revenue Code and pension and benefits law generally (*see, e.g.*, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1132 *et seq.*).

Because Eastern sold its subsidiary EACC in 1987, five years before the date that Congress chose for determining "related person" status under the Coal Act, the plurality and Justice Kennedy in *Eastern* did not consider the constitutionality of the "related person" provisions of the statute. The plurality expressly stated that Eastern did not qualify as a related person to a post-1974 signatory employer and that the statute did *not* impose liability on Eastern as a related person to such an employer. As a consequence, neither the plurality nor Justice Kennedy thought it relevant that EACC, while still wholly owned by Eastern, signed the NBCWAs of 1974, 1978, 1981, and 1984. *See, e.g.*, 524 U.S. at 530 (plurality opinion).

The Companies' suggestion that the result in *Eastern* would not have been different if Eastern had been tied to a "related person" under the Coal Act that had signed a 1974 or later NBCWA is simply wrong. Unlike the imposition of liability on Eastern, controlled group liability under ERISA and MPPAA routinely has withstood constitutional attack. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing*, 691 F. Supp. 6, 27 (W.D. Mich. 1987) (rejecting Takings Clause challenge to controlled group liability under MPPAA), *aff'd*, 892 F.2d 1043 (6th Cir. 1990); *Connors v. Brady-Cline Coal Co.*, 668 F. Supp. 5, 9 n.4 (D.D.C. 1987) (rejecting due process challenge to controlled group liability under MPPAA); *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979) (rejecting Takings Clause challenge to controlled group liability upon termination of single employer pension plan under 29 U.S.C. § 1362), *aff'd*,

630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). *See also Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995) (sustaining liability of sister banks for each other's debts under FIRREA), *cert. denied*, 519 U.S. 810 (1996); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995) (same). Unless the plurality opinion and Justice Kennedy's opinion in *Eastern* somehow could be said to have overruled *sub silentio* the long line of cases upholding controlled group liability – a proposition that the Companies do not advance – then controlled group liability is constitutional here as well.

Further, by incorporating "controlled group" liability into the Coal Act, Congress made a rational choice "to apportion liability among all the companies that collectively made the promise" of lifetime health benefits to the affected miners. *LTV Steel Co. v. Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 491 (2d Cir. 1995), *cert. denied*, 516 U.S. 913 (1995). The Coal Act holds the entire controlled group liable for the legitimate expectations to which any of the group's members contributed. Through these provisions, Congress sought to collapse internal corporate distinctions and treat such groups of companies under common control as single entities for purposes of liability. Congress decided, in other words, that it should not matter in the financing of retiree health care that the Companies have operated their coal business through more than one commonly owned entity, while other coal operators have concentrated all of their coal mining activities in a single corporate entity. The "related person" provisions of the Coal Act simply cut through these corporate forms and impose liability on the overall enterprise. They thus avoid the need to trace the history of shifting entities and to penetrate convoluted structures entirely under private control.

Having rationally decided that controlled group members should be held jointly and severally liable for paying for the expectations that had been created, Congress then had to fix some date for the determination of "related person" status.

Although Congress constitutionally could have chosen a different cut-off date, it rationally chose July 20, 1992, a date close to, but slightly before, the date of the statute's enactment. By choosing a date close to the statute's enactment date, Congress enabled the "related person" inquiry to concentrate on contemporary corporate structures and events, rather than seeking to unravel, for hundreds of employers, including the Companies and their "related persons," corporate transfers and other transactions long since completed. By choosing a date slightly in advance of the statute's enactment date, Congress avoided the possibility that employers, having learned that legislation might well be imminent, would seek hastily to rearrange their corporate structures and affairs so as to eliminate or reduce their potential liability under the pending legislative proposal. As the draft Conference Committee report explained:

> This date was fixed to insure that parent corporations or other entities related to a signatory company could not evade responsibility for the obligations imposed under the [Coal Act] by divesting themselves of their ownership connection prior to enactment.

138 Cong. Rec. 34002 (1992). This legislative choice does not violate the Due Process Clause or any other provision of the Constitution. *See, e.g., Eastern*, 524 U.S. at 525-26 (plurality opinion) (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. MOONEY
ELIZABETH A. SAINDON
MOONEY, GREEN, BAKER & SAINDON, P.C.
1920 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-0010

PETER BUSCEMI
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-5190

DAVID W. ALLEN
Office of the General Counsel
UMWA HEALTH & RETIREMENT FUNDS
2121 K Street, N.W.
Washington, D.C. 20037
(202) 521-2220

Counsel for Respondents the Trustees of
the UMWA Combined Benefit Fund

May 27, 2003